

**CITATION:** Phillips v. Tasma 5 Rialty Ltd., 2024 ONSC1241  
**COURT FILE NO.:** CV-22-685214  
**DATE:** February 28, 2024

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** Beryl Phillips v. Tasma 5 Rialty Ltd. and Michele Zentena also known as Mike Zentena;

**BEFORE:** ASSOCIATE JUSTICE C. WIEBE

**COUNSEL:** Tanya Walker for Tasma 5 Rialty Ltd. and Michele Zentena also known as Mike Zentena;  
Jay H. Krieger for Beryl Phillips.

**HEARD:** February 20, 2024.

**ENDORSEMENT**

[1] The defendants bring this motion seeking an order requiring the plaintiff, Ms. Phillips, to post security for the defendants' costs in the amount of \$150,000.

[2] Ms. Phillips gave Tasma 5 Rialty Ltd. ("Tasma") a first mortgage with a principal amount of \$608,000 bearing 8% per annum interest, which mortgage was registered on the title to property Ms. Phillips owned solely with a municipal address of 664 Old Weston Road, Toronto ("Old Weston Road"). The mortgage was registered on April 26, 2017. The same mortgage was also registered at the same time as a collateral second mortgage on property Ms. Phillips co-owned with one, Horace Hinds, with a municipal address of 29 Four Seasons Circle, Brampton ("Four Seasons"). There were tenants in both properties.

[3] The following facts are not disputed. This cross-collateralized mortgage matured on April 1, 2018, was not renewed and was not paid out. Tasma proceeded to issue Notices of Sale on August 23, 2019. In November, 2019 Tasma commenced actions for possession of both properties. Ms. Phillips was noted in default. Tasma obtained default judgments and writs of possession. Ms. Phillips' former daughter-in-law, Ingrid Russell, started renovations on Old Weston Road prior to June, 2021. Tasma took possession of Old Weston Road on June 29, 2021 and did not give Ms. Russell access. Ms. Phillips accepted an offer of \$990,000 from Ms. Russell on July 7, 2021, but that sale did not close. After two appraisals and two listings, Tasma sold Old Weston Road to Steve Ryan for \$795,000 on September 27, 2021, with the sale closing on October 12, 2021. On October 21, 2021 Tasma gave Ms. Phillips an accounting which showed a shortfall of \$187,003.76. It pursues recovery of this shortfall from Ms. Phillips in its proceedings concerning Four Seasons.

[4] On August 8, 2022, Ms. Phillips commenced this action. Essentially, she claims damages of \$250,000 for an improvident sale of Old Weston Road by Tasma. She claims \$100,000 in damages for economic interference by Tasma in Ms. Phillips' sale to Ms. Russell.

[5] The defendants base their motion for security for costs on Rule 56.01(1)(e), the rule which specifies that the court may make an order for security for costs "as is just" where it appears that, "there is good reason to believe that the action . . . is frivolous and vexatious and that the plaintiff . . . has insufficient assets in Ontario to pay the costs of the defendant."

[6] Having reviewed the evidence, I have concluded that the defendants have failed to meet their onus on this motion, and that motion must fail. These are my reasons:

- a) On such a motion, the plain words of Rule 56.01(1)(e) indicate that the moving party must prove both that the action is likely frivolous and vexatious and that it is likely that the plaintiff has insufficient assets to pay costs. If either test fails, the motion fails.
- b) The first test was not met. The term "frivolous" describes an action that is so highly unlikely to succeed that it is devoid of practical merit, and the term "vexatious" includes actions that obviously cannot succeed and that are brought for an improper purpose; see *XPL Construction Solutions Inc. v. North Bay Capital Investments Ltd.*, 2023 ONSC 238 (CanLII) at paragraphs 34 to 39.
- c) In *Lagani v. Adelaide Capital Corp.*, 1996 CarswellOnt 4819, the court quoted from the leading decision of Lord Justice Salmon in *Cuckmere Brick Co. Ltd. et al. v. Mutual Finances Ltd.*, [1971] 2 All E.R. 633 (C.A.) at 646: ". . . a mortgagee in exercising his power of sale does owe a duty to take reasonable precaution to obtain the true market value of the mortgaged property at the date on which he decides to sell it. No doubt in deciding whether he has fallen short of that duty, the facts must be looked at broadly and he will not be adjudged to be in default unless his plainly on the wrong side of the line."
- d) There is evidence in this motion that suggests that Tasma may have failed to take reasonable precautions in obtaining the true market value of Old Weston Road. First, Tasma refused to allow Ms. Russell to complete the renovations. The sale was in an "as is" condition. This may have adversely affected the property value.
- e) Second, there was no evidence that Tasma approached Ms. Russell for an offer. Ms. Russell was the one after all who had made an offer to Ms. Phillips to purchase the property at \$990,000 on July 7, 2021. Ms. Russell wanted access to allow her mortgage company to assess her financing for such a purchase; but Tasma refused this access. \$990,000 was about \$200,000 more than the price at which Tasma eventually sold Old Weston Road to Mr. Bryan.
- f) Third, there were issues with the two valuations Tasma obtained. The first one was from Home Value Inc. dated July 5, 2021, which valued Old Weston Road at \$720,000 as of that date. However, the report stated that the appraiser considered "the current active listings in this winter market . . .," and concluded the property value was \$720,000. Either this was a mistake or the appraiser in fact considered only winter listings, which were probably

significantly lower than the summer listings. There was no affidavit from the appraiser. In cross-examination, Mr. Zentena said he did not consider this issue with the report. Yet, interestingly, Tasma listed Old Weston Road on July 30, 2021 at \$925,000, \$145,000 greater than the valuation. This suggests Tasma was not confident in the accuracy of the appraisal.

- g) The second appraisal was done by Frontier Real Estate Appraisal on September 15, 2021. It valued the property at \$785,000, a \$65,000 increase from the July, 2021 valuation. The Frontier report noted that the property was maintained in “poor” condition and that there were incomplete renovations. This just begs the question as to what the property would have been worth had Tasma allowed Ms. Russell to finish the renovations.
- h) Fourth, there was an industry document of note. It was a Market Data Dashboard for semi-detached dwellings in Toronto District W03. This was attached to the Home Value appraisal report. Old Weston Road is such a dwelling in this district. The Dashboard shows that as of May, 2021 the “median price” for such dwellings was \$1,100,000 and the “average price” was \$1,113,000. These prices are considerably higher than the sale price of Old Weston Road in the sale to Bryan.
- i) Fifth, there was limited evidence as to the sale process. Mr. Zentena in cross-examination said he did not know how the sale proceeded. In answer to undertakings, he stated that the listing agent informed him that with the second listing there were 3 inquiries and 4 showings. There was no reference to any offers. Old Weston Road was listed the second time on September 20, 2021 at \$825,000. The sale to Bryan happened just seven days later on September 27, 2021 with a closing of October 14, 2021. In short, the sale process occupied less than two months (July 30 to September 27), a compressed timeline. This begs the question as to what effort was really made to test the market.
- j) Sixth, there is the evidence about the purchaser, Steve Bryan. Ms. Phillips alleges that there was collusion between Tasma and Mr. Bryan with the sale. The cross-examination of Mr. Zentena on this issue was telling. At first, Mr. Zentena said he was unsure as to whether he had ever met Mr. Bryan before the sale. Then, when shown a picture of Mr. Bryan, Mr. Zentena conceded that he had a business relationship with Mr. Bryan “through mortgages” for three years before the sale. Then, after an interjection by Tasma counsel, Mr. Zentena reversed his evidence and said he could not connect the person in the photograph with Steve Bryan, the purchaser. It is undisputed that Mr. Bryan is a mortgage broker, a fact that he did not disclose in the agreement of purchase and sale. This wavering and evasive evidence from Mr. Zentena in cross-examination certainly creates suspicion as to whether Ms. Phillips is correct and there was the collusion alleged.
- k) Seventh, there is the question of the action against Mr. Zentena personally. The evidence indicates that he dominates Tasma. Under the common law, the corporate veil can be pierced to make liable a person who controls the corporation and uses it as a shield for fraudulent and improper purposes; see *642947 Ontario Ltd. v. Fletcher*, 2001 CarswellOnt 4296 (C.A.) at paragraph 68. If in fact Mr. Zentena colluded with Mr. Bryan in creating an improvident sale to the prejudice of Ms. Phillips, Mr. Zentena may be found personally liable as well.

[7] Therefore, I have concluded that the defendants have failed to meet their onus of showing that this action is likely without practical merit and is likely being used for an improper purpose. There is in fact evidence suggesting that Tasma may have failed to exercise reasonable precaution in obtaining the true market value of the property. Also, there is evidence that Mr. Zentena may be personally liable for damages for having used Tasma to collude with Mr. Bryan in the sale. Under Rule 56.01(1)(e) that is the end of the matter. The motion is dismissed.

[8] I make a final comment about the “justice” of such a result. Ms. Phillips stated in cross-examination that she would find it difficult to fund this action if she were ordered to post security for costs. The evidence supported this assertion. Given the evidence as to the merits of the case, it would not be “just” to thwart this action with an order for security for costs.

[9] As for costs, the defendants filed a costs outline that shows \$24,034.19 in partial indemnity costs, \$36,051.29 in substantial indemnity costs and \$48,068.39 in actual costs. The plaintiff filed a costs outline that shows \$16,427.38 in partial indemnity costs, \$24,641.06 in substantial indemnity costs and \$32,854.75 in actual costs.

[10] Ms. Phillips was clearly the successful party and deserves costs. Ms. Walker stated at the end of the argument that the defendants made an offer to settle that should be considered. Frankly, given the result, I fail to see how any offer from the defendants would be relevant.

[11] I believe I have enough to decide on costs. This is not a case where the unsuccessful party should pay substantial indemnity costs. The defendants’ case had some merit. Also, given the size of the defendants’ costs outline, the plaintiff’s costs outline is a fair reflection of what the defendants could have reasonably expected to pay in the event of a loss. Given these factors, I have decided to award Ms. Phillips **\$15,000** in partial indemnity costs for this motion, to be paid by the defendants on or before thirty (30) days from today’s date.

[12] To be fair to the parties, should either party be dissatisfied with this costs award, they may deliver written submissions on costs of no more than two pages on or before five (5) days from today. Should that happen, this costs award will be set aside. The other side will then have another five (5) days thereafter to serve and file responding written submissions on costs. I will then reconsider my award. Be aware that, should there be a challenge, I could go in any direction. I will also add the costs of the challenge to my award.

**DATE:** February 28, 2024

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**ASSOCIATE JUSTICE C. WIEBE**